



1963

Recent Developments

Arthur E. Hewitt

R. Bruce LaBoon

Don C. Nix

Banker Phares

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Arthur E. Hewitt, et al., *Recent Developments*, 17 Sw L.J. 665 (1963)
<https://scholar.smu.edu/smulr/vol17/iss4/11>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

RECENT DEVELOPMENTS

Torts — Parental Immunity to Suit by Unemancipated Minor Child

Defendant-father was engaged in his business activity of cutting, felling, and loading trees while his unemancipated minor son slept nearby. It was alleged that Defendant-father negligently allowed a felled tree to be dragged across his sleeping son. The son brought suit by his mother for injuries sustained. The trial court held the Defendant-father immune to suit by his minor child and granted the Defendant-father's motion for summary judgement. *Held, reversed and remanded*: A parent is not immune to suit by his unemancipated minor child for injuries negligently inflicted by the parent while in the performance of his business activities. *Trevarton v. Trevarton*, — Colo. —, 378 P.2d 640 (1963).

Although ordinary property actions between a parent and his minor child were allowed prior to 1891,¹ no reported English or American case had answered the question of whether an unemancipated minor child could sue his parent for personal injuries.² In that year, the issue was raised before the Mississippi Supreme Court in the case of *Hewlett v. George*,³ in which a minor daughter was denied a cause of action against her mother for false imprisonment. In announcing a rule which became the judicial precedent for parental immunity in a majority of American jurisdictions,⁴ the court said: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."⁵ No authority was cited and little argument was offered in support of the decision. The issue was next raised in the Tennessee case of *McKelvey v. McKelvey*,⁶ in which cruel and inhuman treatment was alleged, and in the Wash-

¹ McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1057-58 (1930).

² *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 907 (1930); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198, 199 (1925); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343, 345 (1939).

³ 68 Miss. 703, 9 So. 885 (1891). Note that in 9 So. 885 the case is styled *Hewellette v. George*.

⁴ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 908 (1930); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445, 451 (1950); Prosser, *Torts* 675 (2d ed. 1955).

⁵ *Hewlett v. George*, 68 Miss. 703, 9 So. 885, 887 (1891).

⁶ 111 Tenn. 388, 77 S.W. 664 (1903).

ington case of *Roller v. Roller*,⁷ in which the father had raped his minor daughter. In both *McKelvey*⁸ and *Roller*,⁹ the parents were held immune to the suit by the minor children; *Hewlett* was quoted and cited as the only case in point. These three decisions formed a foundation for the rule which granted absolute immunity to parents from liability to their unemancipated minor children, whether the action alleged willful or negligent conduct and whether the action was brought after or before majority.¹⁰

Recent decisions have produced exceptions to the rule of absolute parental immunity.¹¹ The most significant departures have been in the areas of intentional torts and torts involving conduct which is willful, wanton, or motivated by malice. As early as 1930, absolute parental immunity was struck down by the New Hampshire Supreme Court. The court stated: "Such immunity as the parent may have from suit by the minor child for personal tort . . . is not an answer to a suit for an intentional injury, maliciously inflicted."¹² Although the recent cases uniformly have allowed the minor to maintain an action if the parent is guilty of an intentional tort or conduct motivated by malice,¹³ the courts continue to deny the child a cause of action if the parent is guilty only of an error in judgment, e.g., excessive chastisement.¹⁴ The courts also adhere to the rule of parental immunity in cases in which the parent is charged with ordinary negligence while acting within the scope of the parental relationship.¹⁵ Ordinary negligence by the parent in operation of the family automobile is within the immunity rule;¹⁶ however, if the negligence is

⁷ 37 Wash. 242, 79 Pac. 788 (1905). But see *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952), in which *Roller* was disapproved for being too broad in holding that a minor child cannot, under any circumstances, sue a parent for a tort resulting in personal injuries.

⁸ 77 S.W. at 664.

⁹ 79 Pac. at 789.

¹⁰ *McCurdy, Torts Between Parent and Child*, 5 Vill. L. Rev. 521, 528 (1960).

¹¹ *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950), in which the court said: "It is only in comparatively recent years that dissenting voices have been raised in criticism of adhering to an absolute rule which in some instances has resulted in a denial of justice." *Id.* at 451.

¹² *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 915 (1930).

¹³ *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952), in which the court stated: "It should be mentioned, however, that where the tort of the parent is intentional or there is willful misconduct, the recent decisions uniformly allow the child a cause of action." *Id.* at 152.

¹⁴ *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923, 926 (1951).

¹⁵ *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Mahnke v. Moore*, *supra* note 14; *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563 (1954).

¹⁶ *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952); *St. Croix v. St. Croix*, 17 App. Div. 2d 692, 229 N.Y.S.2d 969 (Sup. Ct. 1962); *Brumfield v. Brumfield*, 194 Va. 577,

gross or the conduct is willful or wanton, recovery has been allowed.¹⁷ Moreover, if the defendant-parent is protected by liability insurance, a few courts have made a further exception on the ground that no disruption of "the peace of society and of families" will result, thereby removing the basic argument for immunity.¹⁸ However, the majority of courts have continued to deny recovery because protection by insurance will not create a cause of action that does not otherwise exist.¹⁹

An exception, which is receiving increasing support, has been made in cases in which, at the time of injury, the parent is engaged in a business or vocational activity as distinguished from conduct relating to parental duty.²⁰ In *Signs v. Signs*,²¹ the court allowed a cause of action by the minor child against his father for personal injuries caused by the father's negligence in conjunction with his business activity and stated:

[W]e have come to the conclusion that, if there ever was any justification for the rule announced in Mississippi in 1891, that justification has now disappeared and that an unemancipated child should have as clear a right to maintain an action in tort against his parent in the latter's business or vocational capacity as such child would have to maintain an action in relation to his property rights.²²

The question presented in the principal case was one of first impression in Colorado. The court recognized the rule of absolute immunity as announced in *Hewlett* and supported by *McKelvey* and *Roller*, but noted a struggle by other courts to support the rule with reason and

74 S.E.2d 170 (1953). But see *Palcsey v. Tepper*, 71 N.J. Super. 294, 176 A.2d 818 (L. 1962) and *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954), *aff'd*, 253 F.2d 286 (3d Cir. 1958), in which cases a minor child was allowed to maintain an action against the estate of his deceased parent for injuries sustained in an automobile accident in which the parent was killed.

¹⁷ *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950).

¹⁸ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). In *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927), the dissenting opinion stated: "And if he [the parent] is thoughtful enough to insure against misfortune due to his negligence to the public at large, must the court step in and deny the infant member of his family the same chance in life as is possessed by the public? I think not." *Id.* at 790.

¹⁹ *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938); *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960).

²⁰ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952). But cf. *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App. 1954) *error ref.*, in which case the business exception argument was rejected, but the court suggested that recovery would be allowed if the conduct of the parent was willful.

²¹ 156 Ohio St. 566, 103 N.E.2d 743 (1952).

²² *Id.* at 748-49.

logic.²³ The language of *Borst v. Borst*²⁴ and *Dunlap v. Dunlap*,²⁵ which rejected absolute parental immunity in favor of a qualified immunity, was quoted with approval.²⁶ In adopting the theory that an unemancipated minor child could maintain an action against his parent if the duty violated fell within the conduct of a business activity, the court made a distinction between parental duties and duties relating to business.²⁷

Thus, three exceptions to parental immunity have been allowed: willful conduct,²⁸ liability insurance,²⁹ and business activity.³⁰ The most widely recognized of these is that involving willful torts. The allowance of an action because the defendant-parent is insured has been rather limited. The instant case is added support to the business activity exception and is further proof of the courts' increasing dissatisfaction with the rule of absolute parental immunity. In limiting the rule announced in *Hewlett*, the recent decisions have developed a new concept of qualified, rather than absolute, parental immunity.

If there is a public interest in preserving the peace and tranquility within families comprising society and if this peace and tranquility will be disrupted by a child's suit against his parent, then there is justification for a *qualified* parental immunity. However, the peace and tranquility argument logically will not support an *absolute* immunity because the parent who intentionally and maliciously injures his child has himself disrupted the peace and tranquility. Further, the peace and tranquility basis logically will not support a distinction between parental duties and duties relating to a business activity. A parent does not wear two hats insofar as his child is concerned. In *Lusk v. Lusk*,³¹ the court stated:

We are not impressed with the idea that the ills accredited to such actions may be obviated merely by suing the parent in his business capacity. Nice vocational distinctions would mean nothing to the child or the parent. To both, the defendant would be essentially the parent,

²³ 378 P.2d at 641.

²⁴ 41 Wash. 2d 642, 251 P.2d 149 (1952).

²⁵ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

²⁶ 378 P.2d at 641-42.

²⁷ *Id.* at 643.

²⁸ See note 13 *supra* and accompanying text.

²⁹ See note 18 *supra* and accompanying text.

³⁰ See note 20 *supra* and accompanying text.

³¹ 113 W. Va. 17, 166 S.E. 538 (1932). The principal case cited *Lusk* as authority for the distinction between parental and business activity duties. In *Lusk* a cause of action was allowed against the parent who was engaged in his business activity at the time of injury, but the court rejected the "business activity" distinction and rested its decision upon the presence of liability insurance. See note 18 *supra* and accompanying text.

and it would be against him (as such) the child would be publicly arrayed.³²

Thus, if peace and tranquility of the home are to remain the basis for qualified parental immunity, there can be no distinction made between parental and nonparental duties.

Arthur E. Hewett

Torts — Products Liability — Strict Liability of the Manufacturer

Plaintiff was injured while using a combination power tool and brought suit against the manufacturer of the tool alleging breach of express warranty, breach of implied warranty, and negligence. The trial court held that the manufacturer was not liable for breach of implied warranty and submitted the express warranty and negligence causes of action to the jury. The jury's verdict was for Plaintiff. On appeal, Manufacturer contended that Plaintiff did not give notice of the breach of warranty within a reasonable time and, therefore, the cause of action for breach of warranty was barred by statute.¹ Since it could not be determined whether the jury verdict was based on negligence or express warranty, Manufacturer argued that the error in submitting the warranty cause of action was prejudicial. *Held, affirmed*: (1) The notice requirement for breach of warranty is not applicable in cases involving personal injury; (2) A manufacturer is *strictly liable in tort* if an article which he places on the market, knowing that it is to be used without inspection, proves to have a defect that causes personal injury; (3) The plaintiff, in order to recover, need prove only that he was injured while using the product in a manner in which it was intended to be used, that the injury was a result of a defect in design and manufacture which made the product unsafe for its intended use, and that he was not aware of the defect. *Greenman v. Yuba Power Prods., Inc.*, 27 Cal. 697, 377 P.2d 897 (1962).

The modern doctrine of manufacturer's liability for defective products had its inception in *MacPherson v. Buick Motor Co.*² In this case, the court held that an ultimate consumer of an "imminently or

³² *Id.* at 538.

¹ Cal. Civ. Code § 1769 (1939), states: "But, if after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore."

² 217 N.Y. 382, 111 N.E. 1050 (1916).

inherently dangerous product" could recover against the manufacturer of that product for injuries caused by the manufacturer's negligence, irrespective of privity of contract between the manufacturer and the injured consumer.³ The *MacPherson* decision was heralded as the opening of a new field in liability for negligent acts.⁴ Before *MacPherson*, express or implied warranty was required in order for an injured consumer to recover. Because these warranties are contractual in nature, the consumer had to show that privity of contract existed between himself and the manufacturer. Aside from breach of warranty, what other theory or basis of recovery is now available to the injured consumer?

If negligence is to be the basis of recovery, the consumer must prove some specific negligent act of the manufacturer. This is many times an extremely difficult burden considering the present day methods of mass production and distribution. The consumer is rarely in a position to analyze the manufacturing process and point to a specific act that caused a particular defect. If the doctrine of *res ipsa loquitur* is used by the courts to relieve the consumer of this burden, the manufacturer then has the burden of introducing evidence to show that he was not negligent in the preparation of the product. Although this makes recovery to some extent easier for the injured consumer, he still will have difficulty in contradicting technical evidence introduced by the manufacturer.

If the rule of strict liability is followed, recovery will be allowed in many cases in which no specific acts of negligence could be proved by the consumer. By allowing the consumer to recover without proof of negligence, the manufacturer is, in fact, made an insurer of the goods he produces. Eminent writers in this field seem to favor this rule as a means of consumer protection. They further justify their position on the ground that the manufacturer is the party who can more easily bear and distribute the loss.⁵

In general, the states conform to one of three patterns in determining the standard of liability imposed upon a manufacturer.

³ *Id.* at 1053.

⁴ Using *MacPherson* as a pattern, the several states have developed their own variations of the basic rule. See, e.g., *Ellis v. Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929); *McLeod v. Linde Air Prod., Inc.*, 318 Mo. 397, 1 S.W.2d 122 (1927); *White Sewing Mach. Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1927); *Dunn v. Purina*, 38 Tenn. App. 229, 272 S.W.2d 479 (1954). See also Prosser, *The Assault Upon The Citadel*, 69 Yale L.J. 1099 (1960), in which he states: "In 1916 there came the phenomenon of the improvident Scot who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability." *Id.* at 1100.

⁵ James, *Products Liability*, 34 Texas L.R. 192 (1956); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 Texas L.R. 855 (1963); Pound, *The Problem of the Exploding Bottle*, 40 B.U.L. Rev. 167 (1960); Prosser, *supra* note 4, at 1122.

A number of jurisdictions follow the *MacPherson* rule and allow recovery against a manufacturer who is not in privity of contract with the injured consumer only if the manufacturer is negligent.⁶ Twenty-one jurisdictions hold the manufacturer strictly liable in cases involving food and drugs prepared for human consumption, but require negligence to be shown in cases involving other products.⁷ Three jurisdictions hold the manufacturer strictly liable for defects causing personal injury, regardless of the nature of the product, if the manufacturer knew that the product could not or would not be inspected by the consumer.⁸ In these jurisdictions, decisions are based upon an interpretation of a statute similar to section 15 of the Uniform Sales Act.⁹ In each case, the court found an implied or express warranty of the goods by the manufacturer which extended to persons other than those in privity of contract with the manufacturer. The California Supreme Court, itself, previously applied the warranty doctrine to hold the manufacturers of food and drugs strictly liable for in-

⁶ Alabama: Birmingham Chero-Coca Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Arkansas: Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288 (1905); District of Columbia: Connecticut Pie Co. v. Lynch, 61 App. D.C. 81, 57 F.2d 447 (1932); Maine: Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); New Hampshire: Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); New York: Bourcheix v. Willow Brook Dairy, 268 N.Y. 1, 196 N.E. 617 (1935); Ohio: Canton Provision Co. v. Gauder, 130 Ohio 43, 196 N.E. 634 (1935); Rhode Island: Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955); South Dakota: Whitehorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940); Virginia: Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936); West Virginia: Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 5 S.E.2d 785 (1939); Wisconsin: Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927).

⁷ Arizona: Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Connecticut: Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961); Florida: Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944); Illinois: Tiffen v. Great Atl. & Pac. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 249 (1959); Iowa: Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Kansas: Graham v. Bottenfield's, 176 Kan. 68, 269 P.2d 413 (1954); Kentucky: Kroger Grocery & Baking Co. v. Schneider, 249 Ky. 261, 60 S.W.2d 594 (1933); Louisiana: LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1933); Maryland: Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Massachusetts: Sullivan v. H. P. Hood & Sons, 341 Mass. 216, 168 N.E.2d 80 (1960); Mississippi: Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Montana: Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939); North Carolina: Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961); Oklahoma: Southwest Ice & Dairy Prod. Co. v. Faulkenberry, 203 Okla. 279, 220 P.2d 257 (1950); Pennsylvania: Bilk v. Abbotts Dairies, Inc., 147 Pa. Super. 39, 23 A.2d 342 (1941); South Carolina: Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); Texas: Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Utah: Walters v. United Grocery Co., 51 Utah 565, 172 Pac. 473 (1918); Washington: Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

⁸ Bookholt v. General Motors Corp., 215 Ga. 391, 110 S.E.2d 642 (1959); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Henningson v. Bloomfield Motors Co., 32 N.J. 358, 161 A.2d 69 (1960).

⁹ Uniform Sales Act § 15 states: "Where the buyer, expressly or by implication, makes it known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose."

juries to the ultimate consumer.¹⁰ The notice provision of the Uniform Act has been applied specifically by the California court in *Whitfield v. Jessup*.¹¹

In the instant case, the court, speaking through Justice Traynor, rejects compliance with the notice requirement as a prerequisite and also the entire Uniform Act as a basis for recovery. Strict liability is extended to manufacturers of *all* products that are placed on the market with the knowledge that they are to be used without inspection by the consumer.¹² Consequently, the basis for products liability in California is no longer implied or express warranty of fitness, but is *strict liability in tort*. In establishing the rule of strict liability in tort, the court departs from all previous authority. Although the court cites four California cases as precedents, these cases were not decided upon such a rule but rather upon the traditional implied warranty of fitness and negligence rules.¹³ Therefore, in the principal case, the court developed a new rule not only in California but in the United States.

The strict liability rule as laid down in *Greenman* does, however, provide the manufacturer with some means of protection against unjust claims. There is language in the case which will allow the defense of assumption of the risk to be made by the manufacturer,¹⁴ and it seems to put the burden of disproving the validity of this defense upon the consumer. The consumer must show that there was a defect in the product, that he was not aware of this defect, and that he was using the product for a purpose for which it was intended to be used. The court's restriction of the rule to defects in "design and manufacture" clearly indicates the extent of the manufacturer's liability. The manufacturer will only be liable for designing and manufacturing defects and will not be an insurer for the negligent acts of the transporter, wholesaler, or retailer. Further, defects resulting from ordinary wear and tear are excluded. The burden will be upon the consumer to show that the defect was one of design and

¹⁰ *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 602, 6 Cal. Rptr. 320 (Ct. App. 1960).

¹¹ 31 Cal. 2d 826, 193 P.2d 1 (1948).

¹² 377 P.2d at 900.

¹³ *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575 (1960); *Jones v. Burgermeister Brewing Corp.*, 198 Cal. App. 2d 198, 18 Cal. Rptr. 311 (Ct. App. 1961); *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (Ct. App. 1961); *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Ct. App. 1960).

¹⁴ The court stated: "To establish the manufacturer's liability it was sufficient that Plaintiff proved that he was injured while using the Shopsmith [lathe] *in a way it was intended to be used* as a result of a defect in design and manufacture of which Plaintiff was *not aware* that made the Shopsmith unsafe for its intended use." 377 P.2d at 901. (Emphasis added.)

manufacture and not merely one that was present at the time of the purchase or injury.

This rule, while eliminating the negligence issue in a products liability case, nevertheless leaves difficult questions concerning: (1) whether the defect was the result of design and manufacture, of ordinary wear and tear, or of negligent acts occurring after the product left the manufacturer's control and (2) whether the defect in "design and manufacture" was the proximate cause of the consumer's injury. Therefore, although the California court somewhat lightens the consumer's burden by relieving him of the obligations of proving specific acts of negligence by the manufacturer and of conforming to the provisions of the sales statutes, the *Greenman* case spells out no easy formula for recovery. The rule of strict liability, therefore, as laid down in the principal case is not as harsh upon manufacturers of consumer goods as it at first may seem.

As stated above, only three other jurisdictions have established strict liability as the rule for manufacturers of all products,¹⁵ but twenty-one jurisdictions have seen fit to hold the producers of food products for human consumption strictly liable, while still requiring proof of negligence in cases involving other kinds of products. The differentiation between food and other products is based upon a theory that food products are usually not inspected before use and are of a particularly dangerous nature if contaminated because they are used internally. Therefore, public policy demands the manufacturer of these products to be strictly liable.¹⁶

Generally, courts are not anxious to hold a manufacturer strictly liable because such a rule allows recovery by consumers against manufacturers who used more than sufficient care to prevent ordinary defects in their products and because the manufacturers have no defense to the consumer's claim that the defect was in the product when purchased. However, in the twenty-one jurisdictions which apply the strict liability rule to food products, these considerations have been overruled by a strong public policy of consumer protection from latent defects in an ultra-hazardous product, namely food.¹⁷ Why do these jurisdictions extend the public policy only to food products? It is evident that human health and life may be placed in even greater peril by other kinds of defective products than it can be by food products. "Even if it should be felt that the restriction should be relaxed gradually, and first in the greatest field of danger,

¹⁵ See note 8 *supra*.

¹⁶ See note 7 *supra*.

¹⁷ *Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

the food area is not necessarily the most dangerous field. *Greater peril lurks in a defective auto wheel than in a pebble in a can of baked beans.*"¹⁸ (Emphasis added.) Following this line of reasoning, federal courts sitting in jurisdictions following the strict liability in food rule have indicated on several occasions their desire to extend the strict liability rule to products other than food.¹⁹

It is submitted that the swing of the pendulum of recovery without negligence or contractual warranty should not stop with food products and that *Greeman v. Yuba Power Prods., Inc.* should serve as an important precedent in extending the ambit of responsibility.

R. Bruce LaBoon

Oil and Gas — Incursion Upon Rule of Capture — Dictum in the Halbouty Case

The Port Acres Gas Field contained forty-seven producing gas wells, twenty-five on large tracts of 160 acres each and twenty-two small-tract exceptions to the spacing rule.¹ The Texas Railroad Commission issued an order adopting a proration formula for the field² which allocated the allowable production for each well $\frac{1}{3}$ equally among the wells and $\frac{2}{3}$ according to the acreage of each well tract. Halbouty and other large-tract operators sued to enjoin the order, alleging that the allocation formula was arbitrary, unreasonable, and confiscatory of their property. The trial court found the order reasonably sustained by substantial evidence and denied the injunction. Direct appeal was brought to the Texas Supreme Court. *Held, reversed*: The $\frac{1}{3}$ - $\frac{2}{3}$ proration formula is invalid; it does not afford a reasonable opportunity to the large-tract owners to produce their "fair share" of the minerals. A "fair share" is substantially equivalent to the recoverable reserves in and under one's tract.

¹⁸ James, *supra* note 5.

¹⁹ B. F. Goodrich v. Hammond, 269 F.2d 501 (10th Cir. 1959); Siegel v. Braniff Airways, Inc., 204 F. Supp. 861 (S.D.N.Y. 1960); Brown v. Chapman, 198 F. Supp. 78 (D. Hawaii 1961).

¹ Rule 37, Tex. R.R. Comm'n Rules & Regs. § 1, at 11, which requires wells to be drilled according to the spacing pattern set by the Texas Railroad Commission, is a reasonable exercise of the police power to prevent waste. Oxford Oil Co. v. Atlantic Oil & Prod. Co., 22 F.2d 597 (5th Cir. 1927), *cert. denied*, 277 U.S. 585 (1928); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935 (1935). The rule provides: "[T]he Commission . . . may grant exceptions to permit drilling within shorter distance . . . when the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property."

² Authorization for the issuance of proration orders for gas reservoirs is granted by Tex. Rev. Civ. Stat. Ann. art. 6008, § 10 (1949). This statute enables the Railroad Commission to prorate gas production (1) to prevent waste and (2) to protect correlative rights.

Halbouty v. Railroad Comm'n, — Tex. —, 357 S.W.2d 364, *cert. denied*, 371 U.S. 888 (1962).

As indicated, the principal issue of the *Halbouty* case was the propriety of excess allowables for small-tract exceptions to Rule 37. This issue had been previously decided in the much-publicized case of *Atlantic Ref. Co. v. Railroad Comm'n*,³ which dealt with the Normanna Field. *Halbouty* followed the precedent of that case. The holdings of *Atlantic* and *Halbouty* in regard to small-tract allowables have been fully and ably treated elsewhere.⁴ However, another aspect of the principal case is important. *Halbouty* contains dictum which could have consequences more far-reaching than the decision of the small-tract issue. In the majority opinion, Justice Culver states:

To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydro-carbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage.⁵

Accepted at face value, this statement seems to eliminate the rule of capture as the basic law of oil and gas in Texas and relegate it to a mere title-vesting device.⁶ If the theory of this dictum is followed in future decisions, unfortunate consequences could result.

The rule of capture may be stated as follows: The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled on his land, though part of such oil or gas may have migrated from adjoining lands.⁷ In its early form, unmodified by statute, the rule of capture allowed an owner to drain the oil and gas of his neighbor without consent⁸ or liability.⁹ The neighbor's only remedy

³ *Atlantic Ref. Co. v. Railroad Comm'n*, — Tex. —, 346 S.W.2d 801 (1961), noted in 16 Sw. L.J. 320 (1962), held on similar facts that a proration formula must give each owner affected by it a reasonable opportunity to produce the recoverable oil and gas in and under his tract or its equivalent in kind. As in *Halbouty*, a $\frac{1}{3}$ - $\frac{2}{3}$ proration formula was held invalid.

⁴ Hardwicke & Woodward, *Fair Share and the Small Tract in Texas*, 41 Texas L. Rev. 75 (1962).

⁵ 357 S.W.2d at 375.

⁶ See Discussion Note, 16 Oil & Gas Rep. 813, 815 (1962).

⁷ *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221, 285 S.W.2d 201 (1956); *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 561 (1948); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923). The rule of capture was first expressed in *Westmoreland & Cambria Nat'l Gas Co. v. DeWitt*, 130 Pa. 235, 18 Atl. 724 (1889). It was subsequently adopted in all oil and gas jurisdictions.

⁸ *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (1945); *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935).

⁹ *Ehlinger v. Clark*, 117 Tex. 547, 8 S.W.2d 666 (1928); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923).

was to "go and do likewise."¹⁰ This policy, attacked as a "law of piracy,"¹¹ was thought necessary in view of the lack of scientific knowledge concerning the behavior and extent of reserves.¹² The oil industry finally became aware that unjustifiable waste was widespread under an unlimited law of capture¹³ and turned to the police power of the state for conservation measures. The Texas Supreme Court responded in *Corzelius v. Harrell*,¹⁴ holding that the law of capture is subject to regulation under the police power of the state. Though limited by the police power, the rule of capture was recognized in Texas as a vested property right,¹⁵ in force at least as recently as 1955.¹⁶

Texas also recognizes the doctrine of ownership in place of minerals¹⁷—the owner of a mineral interest is deemed to own the minerals in place or in the ground until he is divested of such ownership by the law of capture.¹⁸ The two doctrines—rule of capture and ownership in place—are basically incompatible. Since divestment of ownership has been allowed,¹⁹ it seems inescapable that Texas courts have in the past considered the rule of capture as dominant.²⁰

The trend of the Texas courts, as evidenced by the *Atlantic* and *Halbouty* decisions, is to require a more equitable distribution of allowables by the Railroad Commission. To effect this result, the courts are emphasizing the correlation between reserves and "fair share," with significant production in excess of recoverable reserves amounting to confiscation. The *Halbouty* case stated: "It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce

¹⁰ *Barnard v. Monogahela Natural Gas Co.*, 216 Pa. 362, 65 Atl. 801 (1907).

¹¹ Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*,

13 Texas L. Rev. 391, 392 (1935).

¹² *Id.* at 418.

¹³ Shank, *Present Status of the Law of Capture*, Proceedings, 6th Ann. Inst. on Oil & Gas and Taxation at 274 (1955).

¹⁴ 143 Tex. 509, 186 S.W.2d 961 (1945).

¹⁵ *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221, 285 S.W.2d 201 (1956); *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935).

¹⁶ *Ryan Consol. Petroleum Corp. v. Pickens*, *supra* note 15.

¹⁷ *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923); *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915). *Stephens County* also illustrates the fact that ownership in place had its origins in claiming property for tax purposes.

¹⁸ Bickel, *The Right of the Lessee to Pool the Mineral Interest of the Lessor Before and After the Expiration of the Primary Term*, 10 Sw. L.J. 165, 168 (1956).

¹⁹ *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221, 285 S.W.2d 201 (1956); *General Crude Oil Co. v. Harris*, 101 S.W.2d 1098 (Tex. Civ. App. 1937) *error dismissed*.

²⁰ Discussion Note, 16 Oil & Gas Rep. 813, 814 (1962). See *Ryan Consol. Petroleum Corp. v. Pickens*, *supra* note 19.

the gas underlying his land."²¹ This new emphasis on correlative rights in the application of the police power is highly desirable as a modification of the rule of capture, unless it is carried to the fullest extreme of making ownership in place dominant over the rule of capture.

Ownership in place is not a workable basis for a body of oil and gas law.²² The fugitive nature of the product and the complications of differing expulsion mechanisms preclude it.²³ Even with advances in the science of reservoir engineering, reserves cannot yet be perfectly estimated to determine an absolute "fair share." Gearing recovery too closely to reserves would create numerous difficulties. Established statutes which are grounded in the rule of capture, such as the Marginal Well Statute,²⁴ would have to be scrapped. Chaotic situations would result. For example, would an older well that had already pumped its estimated reserves be required to be shut down? How would wells located on the fringes of an oil and gas structure be compensated for their shortened life? Under strict ownership in place, they could demand an excessive allowable to enable them to recover their "fair share" of the common pool before production from more advantageously located wells caused the fringe wells to go to water. To be consistent under the ownership in place theory, an owner should be entitled to enjoin any act of adjacent owners that induced migration of oil and gas from under his land. He would also be entitled to damages for drainage caused by production on other tracts. Would he be entitled to reimbursement to the amount of his "fair share" if he refused to drill? It is clear that the absolute ownership and tracing of substances is not a reasonable solution, nor is the creation of a right to an absolute "fair share."²⁵ The determination of the quantity of the "fair share" would continue to pose an insurmountable obstacle.²⁶ The rule of capture remains the only

²¹ 357 S.W.2d at 374. See Normanna Fields Special Order No. 2-46673, Tex. R.R. Comm'n Rules & Regs. § 7, at 917, 14 Oil & Gas Rep. 885 (1961), which resulted from the *Atlantic* decision.

²² Professor Hardwicke has written:

[Ownership in place] cannot easily be applied, for it would have to be based upon an ability to identify the exact source and original location in place of oil and gas, with ownership depending on the initial underground situs, and not upon the ownership of the well from which the oil is eventually produced. Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 Texas L. Rev. 391, 395 (1935).

²³ *Halbouty* and *Atlantic* both dealt with gas fields. The reserves of an oil pool, with its more complex structure and physical behavior, will be much more difficult to measure.

²⁴ Tex. Rev. Civ. Stat. Ann. art. 6049(b) (1931). The Marginal Well Statute allows extremely low producers to produce at maximum operating capacity and prohibits curtailment of the maximum production by the Railroad Commission.

²⁵ Kuntz, *The Law of Capture*, 10 Okla. L. Rev. 406 (1957).

²⁶ *Ibid.*

workable alternative.²⁷

The question of the dominance of the rule of capture has been debated since the inception of the oil and gas industry. Until now, the Texas Supreme Court has consistently held that "the only safe rule, and the only one free from much confusion, is the one which gives the oil to the man who owns the land upon which the well is located."²⁸ As Justice Griffin said in his dissenting opinion in *Halbouty*: "There is no sound reason for the abandonment of the rules of property which have been long established in Texas."²⁹ For conservation reasons, of course, it is essential that the rule of capture be limited with effective police power regulations. However, the dictum in *Halbouty* seems to suggest more than the police power limitation. If it means that the rule of capture should now be subordinated to ownership in place, it should not be followed.

Don C. Nix

Procedure — Nonsuit in Texas — An Absolute Right

The State of Texas filed an ouster suit in district court X against Defendant, Sheriff of Jefferson County. The State asked the court temporarily to suspend Defendant from office during the pendency of the suit, but court X refused. Defendant's answer asserted that the State, in violation of article 5986,¹ was asking for his removal for acts committed prior to his election. Subsequent to the filing of the answer, a nonsuit was granted by court X upon the State's request. The State then filed the same suit in district court Y and again asked that Defendant be temporarily suspended from office. Court Y granted the request. After the nonsuit in court X was granted, and after court Y temporarily suspended him, Defendant again entered court X and asked it to grant an injunction to restrain court Y from trying the suit, on the ground that court Y did not have jurisdiction because Defendant's counterclaim was still before court X. Court X granted this request and reinstated the action over the State's objections. Seeking to have the order of reinstatement declared void, the State invoked the original jurisdiction of the Supreme Court of Texas

²⁷ *Ibid.*

²⁸ *Japhet v. McRae*, 276 S.W. 669 (Tex. Comm. App. 1925), quoted with approval in *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221, 285 S.W.2d 201 (1956).

²⁹ 357 S.W.2d at 382.

¹ Tex. Rev. Civ. Stat. Ann. art. 5986 (1962) states: "No officer of this State shall be removed from office for any act he may have committed prior to his election to office."

under article 1733.³ *Held*: Under Rule 164 of the Texas Rules of Civil Procedure,³ Plaintiff has the right to a nonsuit at any time before the jury has retired or before the judge has announced his decision in a nonjury case, and a nonsuit, once granted, cannot be subsequently reinstated over the plaintiff's protests. Only if the defendant has asserted a claim for affirmative relief can a court refuse to grant a nonsuit. *Texas v. Gary*, —Tex.—, 359 S.W.2d 456 (1962).

Under the English common law, voluntary discontinuance by nonsuit was not a decision on the merits, and thus a plaintiff was free to bring another action.⁴ As early as 1371, case reports show that a plaintiff was given the right to nonsuit at any time prior to the rendering of the verdict by the jury.⁵ The first statutory restriction was passed in 1400,⁶ and the present rules of the Supreme Court (trial) of England do not permit nonsuit after the receipt of the defendant's answer.⁷ Thus, in the place of its origin, this common-law right has been considerably restricted.

Nonsuit came to this country with the importation of the common law and has been judicially adopted, in the main, by many of the states. Its status has become so firmly entrenched in our law that instances of change or modification have had to come from the legislatures.⁸ The federal rule relating to nonsuit is an excellent example of statutory restriction.⁹ Under this rule, a plaintiff has an absolute

³ Tex. Rev. Civ. Stat. Ann. art. 1733 (1962).

³ Tex. R. Civ. P. 164.

⁴ Head, *The History and Development of Non-Suit*, 27 W. Va. L.Q. 20 (1920).

⁵ The reporter said: "And the jurors were under guard for three days before they could agree; now they were finally at the bar ready to have rendered their verdict and the Plaintiffs were nonsuited. . . ." *Wilkes v. Gernon*, Y.B. Pasch, 48 Edw. 3, 30 (1371).

⁶ 2 Hen. 4, c. 7 (1400).

⁷ Order 26, Rule, *The Annual Practice*, Rules of the Supreme Court 429 (1950).

⁸ Head, *supra* note 4.

⁹ Fed. R. Civ. P. 41(a):

(a) *Voluntary Dismissal: Effect Thereof.*

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. . . .

right to nonsuit at any time before service by an adverse party of an answer or of a motion for summary judgment. After service, if the parties to the action have not filed a stipulation of dismissal, the court in its discretion may refuse to allow dismissal without prejudice or may allow withdrawal only on terms and conditions.¹⁰ An illustrative federal decision is *Harvey Aluminum, Inc. v. American Cyanamid Co.*¹¹ In *Harvey*, the plaintiff filed a complaint seeking an injunction and other relief. After a hearing on the merits in which plaintiff's request for an injunction was denied, but before the defendant's answer in the main suit was served, the plaintiff moved to dismiss. The court granted the defendant's motion to vacate the notice of dismissal. This decision extends beyond the literal wording of the federal rule, which allows dismissal at any time before service by an adverse party of an answer or of a motion for summary judgment. Although the fact situation in *Harvey* is not typical, the holding is indicative of the restrictive attitude of the federal courts toward dismissal and their implementation of the rule to prevent injustice. In the normal case, the right exists according to the literal wording of the federal rule.¹²

As a general rule, most state courts hold that a plaintiff has the right to nonsuit unless the defendant has asserted a claim for affirmative relief.¹³ However, the states vary as to when nonsuit may be taken as a matter of right. Some states have no statutory limit on nonsuit; thus, the courts in those jurisdictions look to the common law for guidance.¹⁴ Other states which have statutes generally allow nonsuit until commencement of the trial.¹⁵ About three-fourths of the states, both statutory and nonstatutory, are liberal as to the time when nonsuit can be taken, allowing discontinuance even after the trial is under way.¹⁶ The most liberal statutory state is Louisiana

¹⁰ *Ibid.*

¹¹ 203 F.2d 105 (2d Cir. 1953).

¹² See *Barrett v. Virginian Ry.*, 250 U.S. 473 (1919), in which the Court stated that the purpose of Rule 41(a)(1), Fed. R. Civ. P., is to safeguard abuse of the right to nonsuit by limiting its application to an early stage in the proceedings.

¹³ *Hartquist v. Tamiami Trail Tours*, 139 Fla. 328, 190 So. 533 (1939); *Lyon v. Craig*, 213 Iowa 36, 238 N.W. 452 (1931); *Thomason v. Sherrill*, 118 Tex. 44, 10 S.W.2d 687 (1928). If the defendant pleaded defensive matters upon which a cross action might have been based, but neglected to pray for affirmative relief, then the answer was defensive only. *Hutchison v. Robert Hamilton & Son*, 234 S.W. 417 (Tex. Civ. App. 1921).

¹⁴ Delaware, Georgia, Maine, Massachusetts, New Hampshire, New Jersey, South Dakota, and Vermont have no statutory limits.

¹⁵ E.g., California and Idaho provide that the nonsuit must be asked for, as a matter of right, before trial. Cal. Code Civ. Proc. § 581(1); *Jalof v. Robbins*, 19 Cal. 2d 233, 120 P.2d 19 (1941); Idaho Code Ann. § 10-705 (1948); *Molen v. Denning & Clark Livestock Co.*, 56 Idaho 57, 50 P.2d 9 (1935).

¹⁶ See Annot., 71 A.L.R. 1001 (1931). Texas follows the majority. *Clevenger v. Cariker*, 110 S.W. 795 (Tex. Civ. App. 1908).

which permits nonsuit anytime before judgment, without the permission of the court.¹⁷

Rule 164 of the Texas Rules of Civil Procedure provides:¹⁸

At any time before the jury has retired the Plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief. When such case is tried by the judge, such non-suit may be taken at any time before the decision is announced.

Texas cases generally hold that the plaintiff has an absolute right to a nonsuit, even after the defendant has answered if the defendant requests no affirmative relief.¹⁹ Rule 164 is unchanged from the predecessor statute,²⁰ and decisions construing that statute govern the interpretation of the rule, which is construed liberally to effectuate the right to nonsuit.²¹ The Supreme Court of Texas has held that an absolute right exists any time before the jury has retired²² or if there is no jury, before the judge announces his decision.²³ Even though the rule states that nonsuit may be taken before the jury retires, the plaintiff may, as a matter of right, have his nonsuit if the jury fails to agree.²⁴ Once nonsuit is granted, the judge has no right to retain the case on the docket.²⁵

Some modification of Rule 164 has come about through case law interpretation. Nonsuit must be made in good faith and cannot be brought repeatedly for harrassment purposes.²⁶ Also, once a defendant files a claim for affirmative relief, the court will retain jurisdiction.²⁷ In *State v. Stanolind*,²⁸ it was held that if the defendant asks for

¹⁷ La. Code Prac. Ann. art. 491 (1942).

¹⁸ Tex. R. Civ. P. 164.

¹⁹ *Brooks v. O'Conner*, 120 Tex. 121, 39 S.W.2d 22 (1931) (plaintiff's right to nonsuit at any time before the jury retires is absolute and cannot be denied).

²⁰ Formerly art. 2182, Tex. Rev. Civ. Stat. (1925).

²¹ See *Smith v. Columbian Carbon Co.*, 145 Tex. 478, 198 S.W.2d 727 (1947); *Texas Van Lines, Inc. v. Templeton*, 305 S.W.2d 646 (Tex. Civ. App. 1957) *error ref. n.r.e.*; *Collins v. Waldo*, 291 S.W.2d 360 (Tex. Civ. App. 1956); *McClendon v. McClendon*, 289 S.W.2d 640 (Tex. Civ. App. 1956).

²² *Smith v. Columbian Carbon Co.*, *supra* note 21.

²³ *Ibid.*

²⁴ *Wiley v. Joinder*, 223 S.W.2d 539 (Tex. Civ. App. 1949).

²⁵ *McMinn v. Department of Pub. Safety*, 307 S.W.2d 283 (Tex. Civ. App. 1957) (the appropriate order to be entered on motion for nonsuit is "dismissal without prejudice").

²⁶ *Walsh & Co. v. Butler, Inc.*, 260 S.W.2d 889 (Tex. Civ. App. 1953), *aff'd*, 152 Tex. 601, 262 S.W.2d 952 (1953); see *University of Tex. v. Morris*, 162 Tex. 60, 344 S.W.2d 426 (1961), in which the supreme court held that a trial court has the power to prevent a plaintiff from prosecuting his cause of action in another court, if such is necessary to prohibit the use of the judicial process for the purpose of harrassment. *Renfroe v. Johnson*, 142 Tex. 251, 177 S.W.2d 600 (1944).

²⁷ *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677 (1956).

²⁸ 190 S.W.2d 510 (Tex. Civ. App. 1945) *error ref.* In *Hoodless v. Winter*, 80 Tex. 638, 16 S.W. 427 (1891), the defendant filed a counterclaim seeking affirmative relief,

affirmative relief, the court has no right to prejudice the defendant's claim by granting a nonsuit requested by plaintiff. The court reasoned that a party to a suit should not have the right to deny his adversary an affirmative claim by the voluntary action of nonsuit. However, dilatory pleas, such as a plea of privilege,²⁹ and pleas not asking for affirmative relief do not prejudice the right to nonsuit.³⁰ Also, the plaintiff's motion for nonsuit is not affected by a later amendment which seeks affirmative relief.³¹

In the principal case, Defendant's contention was that the State had no right to nonsuit because the first court still had jurisdiction over Defendant's "counterclaim." The Texas Supreme Court held that Defendant's answer did not seek affirmative relief; rather, it was an assertion of an affirmative defense. The court said that it knew of no instance in which an affirmative counterclaim had been used in an ouster suit. Moreover, in order for a defendant's claim to constitute one for affirmative relief, it must not depend upon the plaintiff's continuing his suit. Since Defendant's counterclaim was essentially dependent upon the state's action, the court reasoned that it was not a claim for affirmative relief. One example of a valid claim for affirmative relief is found in *Graham v. Seale*.³² In *Graham*, the plaintiff filed for divorce, and the defendant counterclaimed for divorce. The court held that a subsequent motion for nonsuit by the plaintiff would not defeat the court's jurisdiction over the counterclaim. If a defendant, in his answer, moves that the court enjoin the plaintiff from nonsuiting, this would be a valid claim for affirmative relief. However, the only instances in which a de-

and the plaintiff was not permitted to nonsuit because it would prejudice the right of the defendant to be heard on his counterclaim.

²⁹ *Rice v. Raleigh Co.*, 48 S.W.2d 648 (Tex. Civ. App. 1932). A plaintiff's right to dismiss is not affected by the filing of a plea of privilege by a defendant, such being only a dilatory plea presenting no defense to the merits of the plaintiff's cause of action and asserting no cause of action, in any respect, against him. *Ibid.*

³⁰ *Ibid.*

³¹ In *Walker v. Hernandez*, 92 S.W. 1067 (Tex. Civ. App. 1906), the plaintiff moved for nonsuit after the answer was filed, but before the defendant amended asking for affirmative relief. In granting the nonsuit, the court held, "pleadings are considered as consisting alone of the pleadings in existence at the time the plaintiff asks to take nonsuit." *Id.* at 1068. In *Kelly v. National Bank of Denison*, 233 S.W. 782 (Tex. Civ. App. 1921), the defendant, after plaintiff requested nonsuit, asked the court to withhold its order until the defendant could file a counterclaim. The court held that it had no power to grant the defendant's request.

³² 221 S.W.2d 353 (Tex. Civ. App. 1949); see *Standard Oil Co. v. Railroad Comm'n*, 215 S.W.2d 633 (Tex. Civ. App. 1948) *error ref. n.r.e.*, in which a suit was brought against several parties, including the Railroad Commission, to set aside proration orders of the Commission. The Commission, in its answer, prayed that the orders be sustained; the answers of the other parties prayed that the plaintiff take nothing or that judgment be entered approving the proration rules in issue. The court said the defendants' pleadings, taken together, were sufficient to support a prayer for affirmative relief and refused to grant the plaintiff's nonsuit without prejudice.

fendant would be successful in this respect are cases in which the plaintiff seeks a nonsuit in bad faith or repeatedly sues and nonsuits in a harrasing manner.³³

A liberal nonsuit rule can create substantial injustice.³⁴ It has caused many defendants to spend both time and money in preparing and possibly in presenting a case, only to have the plaintiff nonsuit. A plaintiff can take advantage of this device when it appears the case is going badly. Moreover, the rule has little to recommend it but fourteenth-century English precedent and tradition which, in England, has been considerably restricted.³⁵ Realizing the inequities, some jurisdictions in the United States have placed restrictions on the common-law doctrine. The federal rule is an excellent example of the modern trend. Although some of the injustices persist, the federal rule affords substantial protection to the defendant which would not be available under a liberal nonsuit rule. With the modern methods of discovery and the crowded court dockets, there is little justification for a court to allow a plaintiff his nonsuit after his case has been presented. Texas should amend its rule to conform with the federal and state rules which limit nonsuit. However, should the restrictive federal rule be thought too harsh in light of the liberal Texas tradition, some compromise provision could be effected which would relieve the defendant of the hazard of presenting his case only to have a nonsuit entered. Denying the plaintiff the right to nonsuit after he has rested his case would answer many of the arguments pro and con raised by plaintiffs and defendants attorneys. A more restrictive rule, as to the time when and the conditions under which nonsuit is available, would eliminate much injustice.

Banker Phares

³³ *University of Tex. v. Morris*, 162 Tex. 60, 344 S.W.2d 426 (1961); see also *Renfro v. Johnson*, 142 Tex. 251, 177 S.W.2d 600 (1944), in which the plaintiff's attorney stated in open court that suit would be filed against the defendant at every term of court in the future. The court said the suit was brought maliciously without probable cause and granted the defendant's injunction.

³⁴ McDonald, *Texas Civil Practice* § 17.16 (Callaghan 1950).

³⁵ See notes 6, 7 *supra* and accompanying text.